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In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1032

TOWN OF FRANKLIN, ANTHONY CARBONI, TOWN OF SALEM AND ELMER P. CHAPPELL (together with all other duly constituted towns of the State of Connecticut for which permission to intervene was requested, and their respective First Selectmen, the names of the forty-nine such towns which, to the date of printing of this statement, have formally authorized their joinder in seeking intervention being listed in Appendix E hereto),

Appellants

vs.

OLIVER BUTTERWORTH, MIRIAM BUTTERWORTH, S. RAINS WALLACE, ROBERT BEACH, CHARLES JACOBSON, DAVID S. MACLAY, BRADLEY MOREHOUSE, JOHN NORMAN, GEORGE LUCAS AND ALBERT E. HOLLAND,

Appellees

On Appeal from the United States District Court
for the District of Connecticut

JURISDICTIONAL STATEMENT

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No.

TOWN OF FRANKLIN, ET AL.
Appellants

vs.

OLIVER BUTTERWORTH, ET AL.
Appellees

On Appeal from the United States District Court
for the District of Connecticut

JURISDICTIONAL STATEMENT

Order Appealed From

This appeal is from an "Order on Motion to Intervene" entered in the United States District Court for the District of Connecticut at 2:59 p.m. on March 31, 1964. Such order was in accordance with a "Memorandum of Decision on Motion to Intervene by the Towns of Franklin and Salem and Anthony Carboni and Elmer P. Chappell" which, together with the dissenting opinion of Judge Anderson, was filed at 6:44 p.m. on March 26, 1964. Notice of Appeal by the foregoing applicants "together with the Towns of Farmington, Preston, Colchester, Lebanon, New Milford, Ashford, Litchfield, Willington, Sharon,

Canaan, Cornwall, Colebrook, Lisbon, Sterling, Roxbury, Columbia, Burlington, Madison, Bethany, Clinton, East Lyme, Eastford, Bridgewater, Scotland, North Canaan, East Granby and all other duly constituted towns of the State of Connecticut for which permission to intervene was requested, and their respective First Selectmen" was filed in the United States District Court for the District of Connecticut at 4:13 p.m. on March 31, 1964.

The motion to intervene as defendants which was denied by the three-judge district court (Judge Anderson dissenting) was filed on March 9, 1964. Jurisdiction of the district court over the claims in the action in which intervention is sought was claimed under 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. §§ 1343(3) and (4). Pursuant to 28 U.S.C. § 2281 et seq. such action was assigned to a three-judge court.

Opinions Below

Neither opinions of the Court below on appellants' motion to intervene nor any of the other opinions in this case have yet been officially or unofficially reported. In accordance with Rule 15(h) and (i) copies of the majority and dissenting opinions (App. A) and the order (App. B) on such motion are appended hereto. Also appended are the findings of fact and conclusions of law (App. C) and the judgment (App. D) entered in the action since reference thereto may be desirable in considering the issues in this case. A copy of the majority, concurring and dissenting interlocutory opinions of the Court below on the merits totalling 69 pages in the record is not appended to this Jurisdictional Statement because such opinions are not necessary to ascertain the grounds of this appeal and because a copy of such opinions will be appended to the Jurisdictional Statement of Appellants Pinney et al. due to be filed in this Court on or before May 8, 1964.

Jurisdiction of This Court

Jurisdiction of this appeal is conferred on the Supreme Court of the United States by 28 U.S.C. §§ 1253 and 2101(b). Where intervention is a matter of right, an order denying leave to intervene is appealable. 4 *Moore's Federal Practice*, § 24.15, p. 102; *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961); *Sutphen Estates* v. *United States*, 342 U.S. 19 (1951). "In the less frequent case where there is a direct appeal from a district court to the Supreme Court, an applicant for intervention whose motion has been denied . . ould proceed pursuant to Rule 72 which governs appeals in this type of case. An appeal from such an order runs directly to the Supreme Court." 4 *Moore's Federal Practice*, p. 106; *Railroad Trainmen* v. *B & O R. Co.*, 331 U.S. 519 (1947); *United States* v. *California Cooperative Canneries*, 279 U.S. 553 (1929); *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502 (1941). See also *Columbia Gas & Electric Corp.* v. *American Fuel & Power Co.*, 322 U.S. 379 (1944); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137 (1944).

Provision of Constitution of Connecticut Involved on this Appeal

Article Third, Section 3 of the Constitution of Connecticut [General Statutes of Connecticut (Revision of 1948) Volume 1, p. 41] provides:

> "The house of representatives shall consist of electors residing in towns from which they are elected. Every town which now contains, or hereafter shall contain a population of five thousand, shall be entitled to send two representatives, and every other one shall be entitled to its present representation in the general assembly. The population of each town shall be determined by the enumeration made under the authority of the census of the United

States, next before the election of representatives is held. In case a new town shall hereafter be incorporated, such new town shall not be entitled to a representative in the general assembly unless it has at least twenty-five hundred inhabitants, and unless the town from which the major portion of its territory is taken, has also at least twenty-five hundred inhabitants, but until such towns shall each have at least twenty-five hundred inhabitants such new town shall for the purpose of representation in the general assembly be attached to and be deemed to be a part of the town from which the major portion of its territory is taken, and it shall be an election district of such town for the purpose of representation in the house of representatives."

Questions Presented

1. Do duly constituted towns of the State of Connecticut (including towns whose organization antedates both the adoption of the Constitution of the United States and the Constitution of Connecticut) and their respective First Selectmen, in their official capacities and as representatives of the electors of such towns, have a right to intervene as defendants (based not only on Rules 19 and 24 of the Federal Rules of Civil Procedure, but also on the Due Process Clause of the Fifth Amendment to the Constitution of the United States) in an action seeking invalidation for claimed infringement of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States of a provision of the Constitution of Connecticut which provides that "every town . . . shall be entitled to send . . ." specified representatives to the House of Representatives of the Connecticut General Assembly, such a provision guaranteeing representation of each town in the General Assembly having been in existence in Connecticut since the Fundamental Orders of 1638-9.

2. Do requirements of the Due Process Clause of the Fifth Amendment and requirements of said Rule 19 preclude entry by a federal court of an effective decree declaring unconstitutional the aforesaid provision of the Constitution of Connecticut in an action where none of the towns or electors thereof were named as defendants (nor representatives of any such towns or their electors joined pursuant to Rule 23), where the only parties who have been permitted to intervene are officials of the Republican and Democratic Parties none of whom purports to represent said towns or the electors thereof, and where the State officials named as defendants have chosen not to defend the constitutionality of the challenged provision of the Constitution of Connecticut.

Statement of the Case

The action in which appellants seek intervention as defendants was commenced by the filing of a complaint on December 27, 1962, by ten individuals from six different urban towns on behalf of themselves "and all those voters of the State of Connecticut who are similarly situated" in which the Governor, Secretary of State, Treasurer and Comptroller of the State of Connecticut were named as defendants. Such complaint requested a declaration that rights as voters claimed to have been secured to plaintiffs by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States "have been and are being impaired by the present methods of legislative apportionment in Connecticut" together with injunctive relief.

On January 18, 1963, an appearance was filed on behalf of the defendants by the Attorney General of Connecticut and he also filed an answer on their behalf, in which *inter alia* they pleaded no knowledge of the allegations of discrimination made in the complaint and they denied that the Secretary of State

is the representative of all state and municipal election officials. On or about January 25, 1963, a motion to intervene as defendants was filed on behalf of John M. Bailey, individually and as State Chairman of the Democratic Party, and the Democratic Party of Connecticut. At approximately the same time another motion to intervene as defendants was filed on behalf of A. Searle Pinney, State Chairman of the Republican Party, J. Tyler Patterson, Jr., a Republican and the Speaker of the Connecticut House of Representatives, and Frederick Pope, Jr. and Peter P. Mariani, Republican leaders of the State Senate. Each of the foregoing motions alleged that representation of the applicants' interests by existing parties was inadequate and that applicants would be bound by the judgment of the Court. The Court without opinion granted the motions as to the individuals but denied it as to the Democratic Party. Appearances and pleadings filed on behalf of such individual intervenors clearly disclose that they do not purport to represent any other electors of the State of Connecticut nor any town in such State, and the memorandum of decision of Judge Timbers filed on February 10, 1964, states that they "were permitted to intervene as individuals . . ."

No other parties were joined as defendants and no additional parties intervened. A stipulation of the parties dated March 8, 1963 provides that "the defendant Ella T. Grasso is Secretary of State of the State of Connecticut and as such is designated as the Commissioner of Elections of the State of Connecticut by Section 9-3 of the General Statutes of Connecticut, Revision of 1958 and is charged with the duties set forth in Section 9-4 of the General Statutes of Connecticut, Revision of 1958." The aforecited provisions do not make the Secretary of State a representative of any municipality or municipal official. Prior to the decision below an order was entered on a stipulation permitting substitution of an individual residing in Hartford for one of the plaintiffs who had died.

The case was heard by a three-judge Court on October 22, 1963. The only evidence presented consisted of a stipulation, a request for admissions, and certain affidavits. As reported in the interlocutory memorandum of decision by Judge Timbers, "Intervenor Bailey supports generally the position of the plaintiffs" and the Attorney General of Connecticut on behalf of the named defendants "at the hearing took no position with respect to the critical issues in the case but did request an opportunity to comply with any decree by the Court." On December 17, 1963, the Chief Judge of the Court of Appeals for the Second Circuit designated Judge Smith to replace Judge Clark who had died on December 13, 1963. On February 10, 1964, the Court (Judge Anderson dissenting) filed memoranda of decision holding *inter alia* Article III, Section 3 of the Constitution of Connecticut invalid and that neither Connecticut's present system of unit representation of towns nor any other system of representation which precludes substantially equal weighting of all votes in the choice of representatives to the House of Representatives of the General Assembly is permissible under the Fourteenth Amendment. The Court directed counsel to submit proposed forms of decree by March 2, 1964, and scheduled a hearing thereon for March 16, 1964. Plaintiffs proposed entry of a decree referring the matter to a Special Master to hear further evidence relating to and formulating a plan with respect to redistricting of the Senate and reapportionment of the House of Representatives. The Republican Intervenors requested the Court to enter a final decree from which an appeal could be taken. Intervenor Bailey filed detailed proposed plans for redistricting and reapportionment and on March 2, 1964, the Attorney General on behalf of the defendants filed a "Statement of Position" in which it was stated that "defendants endorse" the Bailey plans and that "the defendants also endorse the proposed decree submitted by the Intervenor Bailey which would implement those plans."

On March 9, 1964, the motion to intervene here involved was filed. Part I of such motion requested leave to intervene by the Town of Franklin, Anthony Carboni, Town of Salem and Elmer P. Chappell, described in paragraphs 1 and 2 of such motion as follows:

1. The Town of Franklin, a duly constituted municipal corporation of the State of Connecticut, was incorporated in May, 1786. At a town meeting on March 2, 1964, a resolution was adopted authorizing the Town of Franklin to move to intervene in this action. Anthony Carboni is the duly elected First Selectman of the Town of Franklin and a qualified elector of such Town. Leave to intervene is requested by the Town of Franklin in its corporate capacity and, in addition, the Town of Franklin and Anthony Carboni request permission pursuant to Rule 23 to intervene as representatives of all electors of said Town, said electors being so numerous as to make it impracticable to bring them all before the Court.

2. The Town of Salem, a duly constituted municipal corporation of the State of Connecticut, was incorporated in May, 1819. At a town meeting on March 7, 1964, a resolution was adopted authorizing the Town of Salem to move to intervene in this action. Elmer P. Chappell is the duly elected First Electman of the Town of Salem and a qualified elector of such Town. Leave to intervene is requested by the Town of Salem in its corporate capacity and, in addition, the Town of Salem and Elmer P. Chappell request permission pursuant to Rule 23 to intervene as representatives of all electors of said Town, said electors being so numerous as to make it impracticable to bring them all before the Court."

It was further alleged in Part I that:

"3. Article III, Section 3 of the Constitution of the State of Connecticut expressly provides with respect to representation in the House of Representatives of the State that "Every town which now contains, or hereafter shall contain a population of five thousand, shall be entitled to send two representatives, and every other one shall be entitled to its present representation in the general assembly . . ." By reason of such provision and other provisions of the Constitution of Connecticut the Town of Franklin and the Town of Salem, as well as each other town of this State, has a direct and substantial interest in the subject matter of this action.

4. Article III, Section 3 of the Constitution of the State of Connecticut also provides that "The house of representatives shall consist of electors residing in towns from which they are elected . . ." By reason of such provision and other provisions of the Constitution of Connecticut each elector of the Town of Franklin and each elector of the Town of Salem, as well as the individual electors of each other town similarly situated, has a direct and substantial interest in the subject matter of this action.

5. Neither the Town of Franklin nor the Town of Salem nor any elector of either such town has been joined as a party in this action or given notice of the bringing of such action and an invitation to intervene therein. The Town of Franklin and the Town of Salem each has legal capacity to sue or to be sued.

6. None of the plaintiffs in this action represents nor purports to represent the Town of Franklin nor the Town of Salem nor the electors of either such town.

7. None of the original defendants in this action represents nor purports to represent the Town of Franklin nor the Town of Salem nor the electors of either such town.

8. Neither Intervenor Bailey nor Intervenors Pinney, Patterson, Pope and Mariani represent nor purport to represent the Town of Franklin or the Town of Salem nor has any such intervenor been designated by this Court or otherwise to represent the electors of either such town.

9. In the premises, the representation of the interests of the Town of Franklin and the Town of Salem and of the electors of each said town in this action is or may be inadequate although said towns and electors may be bound by a judgment in this action.

10. Each applicant claims rights to intervene in this action pursuant to Rules 17, 19, 24(a) and 57 of the Federal Rules of Civil Procedure, pursuant to 28 U.S.C. §§ 2201-2202, and pursuant to the Fourteenth Amendment of the Constitution of the United States. In the alternative each applicant requests permission to intervene pursuant to Rule 24(b)."

Part 4 of the motion read as follows:

"Applicants further move pursuant to Rule 24 that leave to intervene as a defendant in this action, both in its corporate capacity and as a representative of its electors, be granted to each other duly constituted town of the State of Connecticut which shall, within a reasonable period of time after the filing of this motion, authorize its joinder with the Towns of Franklin and Salem and appear by

counsel in this action. In support of this motion, the applicants respectfully represent:

1. Other towns of the State of Connecticut, and the electors thereof, are similarly situated to applicants in their relations to the subject matter of this action.

2. A substantial number of such towns by appropriate officials thereof have indicated intentions to move to intervene and to join applicants in this action and actions to implement such intentions are being undertaken in such towns.

3. The interests of justice and of judicial efficiency would be served by avoidance of a multiplicity of motions to intervene and by the granting of this aspect of this motion."

Since the first notice of the action received by appellant towns and their officials was from the publicity given to the Court's decision of February 16, 1964, only the Towns of Salem and Franklin had held town meetings authorizing motions to intervene by March 9, 1964, but by the time of the hearing on the motion one week later other towns had taken similar action and as of the date of the decision denying intervention ten days later, as shown in the "motion for entry of order in accordance with memorandum" filed March 30, 1964, almost thirty towns had voted to join Franklin and Salem. A list of forty-nine towns, together with the dates of their incorporation, which, to the date of printing this statement, have formally authorized their joinder in seeking intervention in this case is appended hereto as Appendix E. The group is bipartisan both in that the two major political parties within the several towns have supported the action taken and in that the currently prevailing party in some of the towns is Democratic whereas in others it is Republican. For example, by sheer coincidence, appellant Car-

boni, First Selectman of the Town of Franklin, was elected as a Democrat, whereas appellant Chappell, First Selectman of the Town of Salem, was elected as a Republican. Such towns are located in all sections of the State.

A legal memorandum in support of the motion to intervene in which appellants set forth their claim that they had a constitutional right pursuant to the Due Process Clause of the Fifth Amendment to the Constitution of the United States to be parties was filed on March 11, 1964, and the motion to intervene was argued March 16, 1964. At 6:44 p.m. on Maundy Thursday, March 26, 1964, (Good Friday is a legal holiday in Connecticut and the following day was Passover) the Court filed its memorandum of decision denying the motion together with a "Memorandum on Form of Judgment", "Findings of Fact and Conclusions of Law" (App. C) and a Judgment (App. D) declaring *inter alia* Article III, Section 3 of the Constitution of Connecticut "void and of no effect." The judgment included an injunction precluding any elections in Connecticut except at large, which injunction was stayed conditioned on filing of any notices of appeal to this Court "within five (5) days from the date of this Judgment", and filing of the record, a jurisdictional statement, and a described motion for early hearing with this Court "within twenty (20) days from the date of this Judgment." As a result of a motion filed by the Republican Intervenors on March 31, 1964, shortly after the filing of appellants' notice of appeal, the foregoing time schedule was somewhat ameliorated. On April 8, 1964, a notice of appeal to this Court from the Judgment was filed by such Intervenors and according to the revised schedule the Statement as to Jurisdiction with respect to that appeal must be filed in this Court by May 8, 1964.

The Questions Presented Are Substantial

In *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court expressly avoided ruling on the issue of what parties were necessary or indispensable in that reapportionment case. Thus footnote 25 to the majority opinion (369 U.S. at 206) stated: "The question whether the named defendants are sufficient parties remains open for consideration on remand." The present case appears to be the first reapportionment case in which such question has been squarely presented. The question of appellants' rights to be parties is dramatically presented in this case because of the facts that many towns in Connecticut antedate both the Constitution of the United States and the Constitution of Connecticut, that a provision of the Constitution of Connecticut expressly grants towns rights to representation in the General Assembly, that no party to the action actually represents or even purports to represent either appellant towns or their electors, and that towns in Connecticut are distinctive corporate bodies.

Thus the questions presented involve far more than just a claimed right to intervene under Rule 24(a) of the Federal Rules of Civil Procedure. Appellants do claim a right to intervene pursuant to such rule and in support of such claim submit that it is quite clear that the representation of their interests by existing parties is or might be inadequate and that they will be bound by the judgment. Appellants are in a position somewhat analogous to the appellants in *Sam Fox Publishing Co., Inc.* v. *United States*, 366 U.S. 683 (1961), insofar as inadequacy of representation is concerned (in that case the plaintiff at least alleged that the named defendant was a representative of both its large and small members; no party was alleged by plaintiff to represent appellants in the present case), but, unlike that case, appellants' rights clearly will be determined in this action.

Appellants will be at least as clearly affected as were the applicants in *Railroad Trainmen* v. *B. & O. R. Co.*, 331 331 U.S. 519 (1947) and *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502 (1941). In implementing Rule 24(a)(2) federal courts often have held parties less clearly or directly affected by matters in litigation than appellants to have an absolute right to intervene. See, e.g., *United States* v. *Martin*, 267 F.2d 764 (10th Cir. 1959); *Ford Motor Company* v. *Bisanz Bros., Inc.*, 249 F.2d 22 (8th Cir. 1957); *Clark* v. *Sandusky*, 205 F.2d 915 (7th Cir. 1953).

Despite the express denial by the Republican Intervenors that they purported to represent appellants, and despite the fact he had in his earlier opinion carefully pointed out that such intervenors were acting only as individuals, Judge Timbers in his opinion denying the motion to intervene stated that the Republican Intervenors "are already ably and articulately representing the small town voters." Appellants agree that counsel for all parties to the action have shown great ability. But it is respectfully submitted that a holding that any party has represented appellant towns or their electors (as pointed out in the dissenting opinion) was clearly erroneous in the face of the record. Moreover, even if the Republican Intervenors had purported to represent appellants, such fact would not be a valid basis for denying intervention. It is settled that "inadequacy of representation is shown . . . if the representative has or represents some interest adverse to the petitioner . . ." 3 *Moore's Federal Practice* 38. It is also settled that ". . . a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent does not afford the protection to absent parties which due process requires." *Hansberry* v. *Lee*, 311 U.S. 32, 45 (1940). Appellants claim a right to be represented in this action by counsel of

their choice who is not encumbered by partisan political responsibilities.

Appellants base their claim of right to intervene on the Due Process Clause of the Fifth Amendment and on Rule 19 as well as on Rule 24(a). As stated in *Moore's Manual of Federal Practice and Procedure*, p. 943 (1962), citing *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502 (1941), "the Supreme Court has held that Rule 24(a) is not a comprehensive inventory of the allowable instances of intervention." And it seems too clear for argument that an indispensable party has an absolute right to intervene [See, e.g. *Washington* v. *United States*, 87 F.2d 421 (9th Cir. 1936)], particularly since failure of a plaintiff to join indispensable parties (or to provide for their representation pursuant to Rule 23) precludes a court from proceeding with an action. Thus the defense of failure to join an indispensable party cannot be waived [Rule 12(h)] and it is settled that either a trial or an appellate court can raise the defect of the absence of an indispensable party on its own motion. 3 *Moore's Federal Practice*, p. 2152; *Flynn* v. *Brooks*, 105 F.2d 766 (D.C. Cir. 1939). Appellants clearly come within the category of indispensable parties as defined in the leading case, *Shields* v. *Barrow*, 17 How. 130 (1854): "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest . . ." See *Moore's Manual*, p. 842; *Texas* v. *I.C.C.*, 258 U.S. 158 (1922); *Roos* v. *Texas Co.*, 23 F.2d 171 (2d Cir. 1927); *Gaw* v. *Higham*, 267 F.2d 355 (6th Cir. 1959); *Order of Railroad Telegraphers* v. *New Orleans, Texas & Mexico R. Co.*, 229 F.2d 59 (8th Cir. 1956), *cert. denied*, 350 U.S. 997 (1956).

Appellants claim that the Due Process Clause protects their interests by requiring that they be made parties to the action. They rely on the line of cases including *Mullane* v. *Central*

Hanover Tr. Co., 339 U.S. 306 (1950); *Schroeder* v. *City of New York*, 371 U.S. 208 (1962); *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956); and *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, 246 (1944), as supporting their claim that they should have been given notice of the bringing of the action at its outset and that they have a constitutionally protected right to be heard. See also *New York* v. *N.Y. N.H. & H. R. Co.*, 344 U.S. 293 (1953), where a municipal corporation was involved. Such a corporation is of course entitled to the protection of the Due Process Clause. Even if appellants had received some informal notice of the pendency of the action such could not be a substitute for the constitutionally required notice [See *Wuchter* v. *Pizzutti*, 276 U.S. 13, 24 (1927)] and it is settled that a Court's feelings regarding the merits of a decision is irrelevant to the question of right to be heard. *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424 (1914). Such right is not dependent on timely application: responsibility for naming all such parties is on the plaintiff.

The Court below in its memorandum denying the motion to intervene conceded that "none of the parties or intervenors are actually speaking for the towns qua towns" but held that the towns "do not have a substantial interest in this matter," but rather that they "are in effect election districts for purposes of this suit." Rule 17(b) requires the Court to look to Connecticut law to determine the capacity of the towns. Section 52-73 of the General Statutes of Connecticut (1958 Revision) expressly authorizes towns to "prosecute and defend civil actions" and to "employ attorneys in such actions." Section 52-57 prescribes the manner of service of process on towns. Many of Connecticut's towns were organized long prior to organization of the State and the town in Connecticut possesses a status in the governmental organization very comparable to the States in the federal government. In addition to Article III, Section 3 there are many references in the Constitution of Connecticut (1818) and in amendments thereto to the powers and duties

of towns. See, e.g. Art. VI, Sec. 3 (qualifications of electors); Art. X, Sec. 2 (election of town officers); Art. XI (amendments); Amend. VI (refers to "representatives to which such town shall be by law entitled"); Amend. X (appointment of Justices of Peace); Amend. XVIII (qualification of electors).

Connecticut law clearly recognizes the rights of towns not only to participate in litigation which might adversely effect the interests of their inhabitants, but also the rights of towns to litigate to protect their own corporate interests. See *Darien* v. *Stamford*, 135 Conn. 71, 77 (1948); *Keating* v. *Patterson*, 132 Conn. 210, 211 fn. 1 (1945); *National Transportation Co., Inc.* v. *Toquet*, 123 Conn. 468, 482 (1937). The Supreme Court of Errors of Connecticut in *Farrel* v. *Town of Derby*, 58 Conn. 234 (1889), expressly upheld the right of a town to appear and defend its interests in proceedings designed to divide its territory ("The right to self-defense is well nigh universal. Towns are not exceptions to the rule. They have a right to defend their existence, and to ask for its continuance, even when it is proposed to deprive them of it by law . . . their right to be heard must be unquestionable.") and expressly rejected the contention "that the organized community may not appear to protect the community interest, but each individual in the community may appear and defend such interest as he may have . . ." The Court replied to such argument (58 Conn. at 247) that "if either is to be excluded it would seem more natural to exclude the individual and admit the corporation. It seems to us much more reasonable that the organization, representing the whole, should act for the benefit of all and at the expense of all."

Both the highest Connecticut Court and this Court have recognized that Connecticut towns have rights under the Constitution of Connecticut. See *State ex rel. Bulkeley* v. *Williams*, 68 Conn. 131, 149 (1896), *aff'd* sub nom *Williams* v. *Eggleston*, 170 U.S. 304, 310 (1898). And there are a plethora of cases in the federal courts recognizing the rights of municipal corpora-

tions to intervene in actions [See, e.g., *St. Louis Southwestern R. Co.* v. *Yates*, 23 F.2d 283 (8th Cir. 1927); *City of Pittsburg* v. *F.P.C.*, 237 F.2d 741, 745 (D.C. Cir. 1956)] as well as holding that in appropriate circumstances a municipal corporation can be an indispensable party. See, e.g., *General Investment & Services Corp.* v. *Wichita Water Co.*, 236 F.2d 464, 465 (10th Cir. 1956); *United States* v. *Newhard*, 15 F.R.D. 348 (W.D. Pa. 1954).

As a result of the holding in *Baker* v. *Carr* this Court must fashion a body of law balancing the dictates of the Equal Protection Clause against the rights of the States to fashion their own legislatures. In such a delicate area the Court should be especially alert to insure that all having legally recognized interests are afforded the full protection of procedural due process. Under the Constitution of Connecticut and Connecticut law as well as under the Fifth Amendment appellant towns and the electors of such towns clearly have substantial interests in any reapportionment of the Connecticut House of Representatives. The right of the towns to send representatives to the General Assembly antedates the present Connecticut Constitution, being derived from the Fundamental Orders of 1638-9. Appellants respectfully submit that no claimed urgency or desire for haste with respect to rights claimed under the Equal Protection Clause of the Fourteenth Amendment is or can be a justification for failing to accord to appellants the elementary and fundamental requirements of due process.

Respectfully submitted,

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Appendix A

Memorandum Of Decision On Motion To Intervene By The Towns Of Franklin And Salem, And Anthony Carboni And Elmer P. Chappell

The towns of Salem and Franklin and two individuals, their First Selectmen, claim they have a right to intervene in this litigation because they are indispensable parties. The basis of this contention is that the rights and interests of these small towns will be affected by any decree rendered in this case, and there is no party in the litigation purporting to represent the small towns.

If Salem and Franklin are correct, all the towns in Connecticut would have to be represented in this litigation. Small towns, large towns, middle-sized towns, rural towns, urban towns, old towns, and new towns would all be necessary parties. As it now stands, none of the parties or intervenors are actually speaking for the towns qua towns. But towns qua towns do not have a substantial interest in this matter. To be sure, the Connecticut Constitution provides that towns shall be entitled to send one or two representatives to the general assembly, but all this means is that citizens of the towns shall vote for one or two representatives. The town as a corporate municipality has no more interest in the outcome of the litigation than it would if it were a senatorial district whose lines were being attacked as unfair. The town, in the sense of its selectmen or representatives, does not elect or select a representative; that is a function of the individual voter. Conn. Const., Art. Third. Secs. 7, 8.

The plaintiffs in this case attack that portion of the Connecticut Constitution which apportions the House according to town lines. There is no direct attack on the towns. Any inter-

est the towns have is collateral via maintaining the effectiveness of their citizens' votes. How or why the decree would be binding on the towns is a little hard to see.

As the towns of Franklin and Salem concede in their brief (p. 12), no court has yet decided explicitly what parties are indispensable in a reapportionment case. Yet in *Gray* v. *Sanders*, 372 U.S. 368 (1963), where the Supreme Court invalidated Georgia's county-unit voting system, the Georgia counties were not parties to the suit. In *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala. 1962), the Alabama counties were not parties to the suit to reapportion the legislature though the Alabama Constitution gave each county one representative. There is no perceptible difference between the interests of the Alabama and Georgia counties in those cases, and the Connecticut towns in this case. A survey of the recent reapportionment cases indicates that the essential parties defendant are the state officials charged with administering the elections of the state. Indeed, in *Mann* v. *Davis*, 213 F. Supp. 577 (E.D. Va. 1962), the governor and attorney general of Virginia were dismissed as parties defendant because they had no special relation to the elections in the suit, while in *League of Neb. Municipalities* v. *Marsh*, 209 F. Supp. 189 (D.C. Neb. 1962), the mayors of cities were considered improper parties in their official capacities.

The towns are in effect election districts for the purposes of this suit, and have no right to intervene as necessary parties. Since their motion is untimely, it may quite properly be denied. See *Thigpen* v. *Meyers*, 211 F. Supp. 826, 827 n. 2 (W. D. Wash. 1962), where the motion of the state Grange to intervene four days before trial was dismissed as untimely.

The Pinney intervenors, two of whom are electors in towns of less than 5,000 population, are already ably and articulately representing the small town voters.

The motion to intervene is denied.

J. JOSEPH SMITH
United States Circuit Judge

(Dissenting)

ROBERT P. ANDERSON
United States District Judge

WILLIAM H. TIMBERS
United States District Judge

March 26, 1964.

ANDERSON, District Judge, dissenting:

It is my opinion that the motion should be granted so as to permit intervention by the individual petitioners, representing electors of the 152 towns with populations of 41,662 or under, which includes Salem and Franklin, and I also would grant leave to an equal number of qualified persons to intervene to represent the electors of the 17 towns with a population in excess of 41,662. For the purpose of this action the small towns or rural areas should be defined as the 152 municipalities with populations of 41,662 and under, and the cities or urban areas should be defined as the 17 towns having populations in excess of 41,662. If both houses of the General Assembly were based purely on population, the cities with populations over 41,662 would contain a majority of the population of the State and would, therefore, control both houses of the General Assembly.

As the basic issue in this case is whether or not the unit system of representation in one house of a bicameral legislature is unconstitutional even when the other house is based purely

upon population, the electors of the small towns have at stake whether or not they can retain sufficiently effective representation in the General Assembly to preserve their power to manage their local affairs.

They are the real parties in interest. Although the court has approached and dealt with the issues in this case solely as difficult problems in constitutional law, unrelated to either immediate or long range political party consequences, the intervenors have been perfectly candid in letting it be understood that they have interests in the case stemming from their identification with particular political parties. Moreover, the plaintiffs take a position adverse to the petitioners, and it is certainly not clear that their claims for relief and for remedial recommendations are entirely consistent with those desired by the electors of the large urban centers in the role of unlimited controllers of legislative power in Connecticut, who, as such, are also unrepresented. This is not to suggest that the parties and the intervenors have not made highly competent presentations or that they have not contributed tremendously to the determination of the issues in the case because the contrary is certainly true. It is to say, however, that their interests are not squarely identified with those of the petitioners and the voters similarly situated in the large cities.

Although in modified form the membership of the Houses of the Connecticut General Assembly has been based upon population in the upper house and upon the unit system in the lower house, the Attorney General has taken a position adverse to the constitutionality of any use of the unit system. In many jurisdictions, where similar issues have been before the courts, the attorney general has appeared in the role of a defender of the existing state system; but he is certainly not required to do so. This is only mentioned because his position on the issues in this case became clear only recently and affords a reason why the

petitioners should not have been expected to seek intervention earlier. It also provides an added reason why the petitioners should be permitted to intervene because no one represents small town interests, as such, versus urban areas, as such. Small town electors who belong to the Democratic Party, or no party, and big city electors who belong ot the Republican Party, or no party, should be able to have their interests represented uncolored by considerations of the immediate advantage or disadvantage to any political party.

Constitutions are made for the centuries and while there are probably very few, the provisions of which, have been unaffected by partisan political concerns, the main intention and purpose has been through them, to establish a system of government, responsive to the needs of the people and providing allocations of governmental power with a system of checks and balances to insure the continuance of that responsiveness and protect the liberties of the people. They are designed to embody the fundamental principles of the state government and to have a high degree of stability and permanency. They are not intended, like statutes, to change to meet every significant alteration in social or economic condition. They should not be amended solely to meet the needs or desires of any political party. In fact, constitutional provisions which may appear to aid a political party at one time may, twenty years later, be quite adverse to its interests.

Electors of the small towns, as such, have their interests vitally affected by the issues in this case. They are not represented now, nor is there adequate representation for their opposite numbers in the large cities. The individual petitioners and an equal number from the large cities, should be permitted to intervene to present their cases unaffected by extraneous interests.

Appendix B

Order On Motion To Intervene

The Town of Franklin and the Town of Salem, and the individuals Anthony Carboni and Elmer P. Chappell, the first selectmen of said towns, respectively, having moved March 9, 1964 to intervene as defendants herein; and

The Court having heard arguments by counsel on March 16, 1964 and having received and considered their briefs; and

The Court having filed its Memorandum of Decision on March 26, 1964 (one judge dissenting in part) denying said motion; it is

Ordered that said motion to intervene be, and the same hereby is, denied.

Dated at New Haven, Connecticut, this 31st day of March, 1964.

Gilbert C. Earl
Clerk

Appendix C

Findings Of Fact And Conclusions Of Law

The Court, after full hearing, makes the following Findings of Fact and Conclusions of Law.

Findings Of Fact

1. The plaintiffs are all residents and qualified voters in the State of Connecticut, and more particularly are residents and qualified voters in the following Towns and Senatorial Districts:

(a) Oliver Butterworth, Miriam Butterworth and S. Rains Wallace, in the Town of West Hartford, in the Fifth Senatorial District;

(b) Robert Beach and Charles Jacobson, in the Town of Manchester, in the Fourth Senatorial District;

(c) George Lucas, in the Town of East Hartford, in the Fourth Senatorial District;

(d) Bradley Morehouse and John Norman, in the Town of Fairfield, in the Twenty-fifth Senatorial District;

(e) David S. Maclay, in the City of Bridgeport, in the Twenty-first Senatorial District; and

(f) Albert B. Holland, in the City of Hartford, in the Second Senatorial District.

2. The Pinney intervenors are all residents and qualified voters in the State of Connecticut, and more particularly are residents and qualified voters in the following Towns and Senatorial Districts:

(a) A. Searle Pinney, in the Town of Brookfield, in the Twenty-fourth Senatorial District;

(b) J. Tyler Patterson, Jr., in the Town of Old Lyme, in the Twentieth Senatorial District;

(c) Frederick Pope, Jr., in the Town of Fairfield, in the Twenty-fifth Senatorial District;

(d) Peter P. Mariani, in the Town of Groton, in the Eighteenth Senatorial District.

Two of the Pinney intervenors are residents and qualified voters in towns of less than 5,000 population: A. Searle Pinney of Brookfield (pop. 3,405) and J. Tyler Patterson, Jr. of Old Lyme (pop. 3,068).

3. The intervenor John M. Bailey is a resident and qualified voter in the State of Connecticut, and more particularly is a resident and qualified voter in the Town of Hartford, in the Second Senatorial District.

4. The defendants are elected officials of the State of Connecticut, as follows:

(a) John Dempsey is the Governor of the State of Connecticut,

(b) Ella T. Grasso is the Secretary of the State of Connecticut;

(c) Donald J. Irwin is Treasurer of the State of Connecticut;

(d) Raymond S. Thatcher is Comptroller of the State of Connecticut;

(e) As Secretary of the State of Connecticut, Ella T. Grasso is also designated Commissioner of Elections, Section 9-3, General Statutes of Connecticut, Revision of 1958, and is, under Connecticut law, charged with supervisory and other duties relating ot the conduct of elections.

5. In each of the Towns of Connecticut (169 in number), a number of persons are charged, under Connecticut law, with various duties relating to the conduct of elections. The total number of such persons are too numerous to make it practicable to bring them all before the Court.

6. The complaint in this action seeks to restrain the enforcement, operation or execution of portions of the Constitution and certain statutes of the State of Connecticut by restraining the action of the defendants upon the ground that the Connecticut Constitution and such statutes contravene the Constitution of the United States.

7. The Court takes judicial notice that Connecticut is a small, compact State, the dimensions of which are approximately 89 miles by 54 miles. No part of the State is more than two hours distant by automobile from the City of Hartford, the capital of the State, and no part of the State is more than four hours distant from any other part of the State.

8. The population of the State of Connecticut in 1960 was 2,535,234 and in 1820 was 275,248.

9. The Constitution of the State of Connecticut, presently in effect, was adopted in 1818 and, from time to time since then, has been amended.

10. The Connecticut Constitution establishes a bicameral General Assembly.

11. The provision of the Connecticut Constitution relating to the Senate of the State of Connecticut is as follows:

> "Article III, Section 5.
>
> The number of senatorial districts shall not be less than twenty-four nor more than thirty-six, and each district shall elect only one senator. The districts shall always be composed of contiguous territory, and in forming them regard shall be had to population in the several districts, that the same may be as nearly equal as possible under the limitations of this section. Neither the whole or a part of one county shall be joined to the whole or a part of another county to form a district, and no town shall be divided, unless for the purpose of forming more than one district wholly within such town, and each county shall have at least one senator. The districts, as now established by law, shall continue the same until the session of the general assembly next after the completion of the next census of the United States, which general assembly shall have power to alter the same, if found necessary to

preserve a proper equality of population in each district, but only in accordance with the principles above recited; after which said districts shall not be altered, nor the number of senators altered, except at a session of the general assembly next after the completion of a census of the United States, and then only in accordance with the principles hereinbefore provided. The persons voted for for senators shall, at the time of such vote, belong to and reside in the respective districts in which they are so voted for."

12. Article Third, Section 3, was adopted in 1901.

13. The last general redistricting of the Senate took place in 1903, at which time the General Assembly divided the State into thirty-five districts. A thirty-sixth district (Greenwich) was added in 1941. Aside from the addition of this district and some shifting of boundaries between the districts in New Haven, there has been no valid redistricting of the Senate since 1903.

14. Legislation enacted in 1953 to redistrict the Senate was invalidated by the Connecticut Supreme Court of Errors upon the ground that only the session of the General Assembly next after completion of the United States census has the power to redistrict the Senate.

15. All other attempts to redistrict the Senate have failed.

16. As presently constituted, the Senatorial Districts and the population of each such district are as stated in paragraph 2c of the Stipulation in this case dated March 8, 1963.

17. The disparity between the most populous Senatorial District (the Twenty-fifth with 175,940 inhabitants) and least populous District (the Tenth with 21,627 inhabitants), is in a ratio of 8 to 1.

18. If the total population of the State of Connecticut is divided by the number of Senators in the Senate of the State of Connecticut, the norm for each Senate District is 70,423. The average population of the five most populous districts is 159,721, or 226.8% of the norm. The average population of the five least populous districts is 28,722 or 40.8% of the norm.

19. The population of the five most populous Senatorial districts represents 31.5% of the total population of the State and elects five Senators (13.9% of the total number of Senators). The population of the five least populous Senatorial Districts represents 5.6% of the total population of the State and also elects five Senators.

20. The Senatorial Districts having a total population of 811,242, or 31.9% of the total population of the State, elect 19 Senators, a majority of the Senate.

21. Seventeen of the 36 Senatorial Districts have populations 25% or more below the norm. Those 17 Districts have a total population of 699,249, or 27.6% of the total population of the State, and elect 47.2% of the Senate.

22. Eight of the 36 Senatorial Districts have populations 25% or more above the norm. Those 8 Districts have a total population of 1,112,620, or 43.9% of the total population of the State, and elect 22.2% of the Senate.

23. By reason of the limitations set forth in Article Third, Section 5, of the Connecticut Constitution, the Senate cannot be redistricted in conformity with that Article in such manner as to avoid disparities between the most populous and least populous Districts which are on the order of two to one.

24. The provision of the Constitution of the State of Connecticut establishing representation in the House of Representatives is as follows:

> "Article III, Section 3.
>
> The house of representatives shall consist of electors residing in towns from which they are elected. Every town which now contains, or hereafter shall contain a population of five thousand, shall be entitled to send two representatives, and every other one shall be entitled to its present representation in the general assembly. The population of each town shall be determined by the enumeration made under the authority of the census of the United States, next before the election of representatives is held. In case a new town shall hereafter be incorporated, such new town shall not be entitled to a representative in the general assembly unless it has at least twenty-five hundred inhabitants, and unless the town from which the major portion of its territory is taken, has also at least twenty-five hundred inhabitants, but until such towns shall each have at least twenty-five hundred inhabitants such new town shall for the purpose of representation in the general assembly be attached to and be deemed to be a part of the town from which the major portion of its territory is taken, and it shall be an election district of such town for the purpose of representation in the house of representatives."

25. The Fundamental Orders of 1638-9 provided that the three original towns of Hartford, Windsor and Wethersfield were to send "four of their Freemen" as their deputies to every General Court, and new towns were to send "so many deputies as the Court shall judge meet, a reasonable proportion to the number of Freemen that are in the said towns."

26. The Charter of 1662, granted by Charles II, provided that the General Assembly should have not more than two persons from each town.

27. The Constitution adopted in 1818 provided that in the House existing towns should have the same number of representatives "as are at present practiced and allowed; new towns, formed after the adoption of the Constitution, should have one."

28. By constitutional amendment in 1874, every town having more than 5,000 persons was allotted two representatives.

29. By constitutional amendment in 1876, the requirement was added that new towns must have a population of at least 2500 before becoming entitled to one representative.

30. All attempts to reapportion the Connecticut House of Representatives have failed.

31. The present number of representatives is 294. In 1959 it was 279. In 1903 it was 255. In 1821 it was 203.

32. The population of the Towns in the State of Connecticut in the years stated, and the number of representatives of each Town in the Connecticut House of Representatives in the year stated, are as enumerated in paragraph 2b of the Stipulation in this case dated March 8, 1963.

33. The population of the ten most populous Towns and Cities of the State is 988,818, or 39% of the population of the State, and they elect twenty representatives, or 6.8% of the total number of representatives.

34. The population of the ten least populous Towns is 7,554, or 0.2% of the total population of the State, and they elect twelve representatives, or 4.0% of the total number of representatives.

35. Towns having a total population of 301,485, or 11.9% of the total population of the State, elect 148 representatives, a majority of the House of Representatives of the State.

36. If the total population of the State is divided by the number of representatives in the House of Representatives of the State, the result is 8,623 persons per representative ("the norm").

37. The average population of the ten most populous Towns and Cities in the State of Connecticut is 98,882, and each such Town or City is entitled to two representatives. The representatives of such Town and Cities represent, on the average, 49,441 persons, or 573.4% of the norm.

38. The average population of the ten least populous Towns in the State of Connecticut is 755, and each such Town is entitled, on the average, to 1.2 representatives each. The representatives of such Towns represent, on the average, 629 persons or 7.3% of the norm.

39. A representative from the City of Hartford represents, on the average, 81,089 persons. A representative from the Town of Union represents, on the average, 191 persons. The vote of a resident and voter of Union is weighted 424.5 times as heavily as the vote of a resident and voter of Hartford.

40. One hundred nineteen of the 169 Towns in the State of Connecticut have populations per representative 25% or more below the norm, and 27 have populations per representative 25% or more above the norm. The Towns below the norm have a total population of 518,647, or 20.4% of the total population of the State, and elect 194 representatives, or 66.0% of the House. The 27 Towns in the State with a population per representative 25% or more above the norm have a total population of 1,626,794, or 64.2% of the total population of the State, and elect 54 representatives, or 18.3% of the House.

41. Forty-four of the 169 Towns in the State elect only one representative; such Towns range in size from 600 to 4,785; their average population is 2,373; their total population is 104,435, or 4.1% of the total population of Connecticut, and they elect 15% of the House.

42. All the plaintiffs are residents of Towns the representatives of which represent in the House of Representatives constituencies more than 25% above the norm.

43. All the plaintiffs except the plaintiffs Maclay and Holland are residents of Senatorial Districts in which the population is more than 25% above the norm.

44. The Court takes judicial notice that the Towns of Waterbury, Naugatuck, Seymour, Ansonia and Derby, located in the Naugatuck Valley, are not markedly different from each other in their basic economy or compositions; similarly, the Towns of Wilton, Weston, Easton and Westport, located in Fairfield County, are not markedly different from each other in their basic economy or compositions.

45. No currently relevant reason is to be found in the record or is known to the Court why the Town of Madison, with a population of 4,567 persons, has one representative in the House of Representatives, while the Town of Union, with a population of 383 persons, has two such representatives.

46. No currently relevant reason is to be found in the record or is known to the Court why the City of Waterbury, with a population of 107,130 persons, has two representatives, while its adjoining neighbor to the south, Naugatuck, similarly situated geographically and economically, but with a population of 19,511 also has two.

47. No currently relevant reason is to be found in the record or is known to the Court why the Town of Westport, with a

population of 20,955 persons, has two representatives, while its neighbor to the north, Wilton, similarly situated geographically and economically, but with a population of 8,026, also has two representatives.

48. The amending process, under the Connecticut Constitution, is as follows:

> "Amendment To Constitution, Article I, Section 1. Whenever a majority of the house of representatives shall deem it necessary to alter or amend this constitution, they may propose such alterations and amendments, which proposed amendments shall be continued to the next general assembly and be published with the laws which may have been passed at the same session; and if two-thirds of each house, at the next session of said assembly, shall approve the amendments proposed, by yeas and nays, said amendments shall, by the secretary, be transmitted to the town clerk in each town in this state, whose duty it shall be to present the same to the inhabitants thereof, for their consideration, at a town meeting, legally warned and held for that purpose; and if it shall appear, in a manner to be provided by law, that a majority of the electors present and voting on such amendments at such meetings shall have approved such amendments, the same shall be valid, to all intents and purposes, as a part of this constitution."

Conclusions Of Law

1. The complaint herein sets forth a justiciable controversy between the parties. The Court has jurisdiction of this action under 42 U.S.C. §§ 1983, 1988 and 28 U.S.C. § 1343(3) and (4).

2. The plaintiffs herein are persons residing in legislative districts having less representation than they are entitled to,

are properly representative of the class in behalf of which they sue and have standing to maintain this action.

3. The defendants herein are the principal persons charged with responsibilities relating to the conduct of elections to the legislature and the defendant Ella T. Grasso is properly representative of the class of persons charged with the duties of conducting elections in the State of Connecticut.

4. The present districting of the Connecticut Senate so debases the voting rights of plaintiffs as to result in an invidious discrimination against plaintiffs who thereby are denied the equal protection of the laws in contravention of the Fourteenth Amendment of the United States Constitution.

5. The present apportionment of the Connecticut House of Representatives so debases the voting rights of plaintiffs as to result in an invidious discrimination against plaintiffs who thereby are denied the equal protection of the laws in contravention of the Fourteenth Amendment of the United States Constitution.

6. So much of Article Third, Section 5, of the Connecticut Constitution as imposes limitations upon equality of population between districts of the Connecticut Senate, being in contravention of the equal protection clause of the Fourteenth Amendment of the United States Constitution, is void and of no effect.

7. Article Third, Section 3, of the Connecticut Constitution, which precludes substantially equal weighting of the votes of all voters in the choice of members of the Connecticut House of Representatives, being in contravention of the equal protection clause of the Fourteenth Amendment of the United States Constitution, is void and of no effect.

Dated at New Haven, Connecticut, this 26th day of March, 1964.

J. Joseph Smith
United States Circuit Judge

William H. Timbers
United States District Judge

Robert P. Anderson
United States District Judge

(Concurring in part and dissenting in part in accordance with my dissenting opinions of February 10, 1964 and March 26, 1964)

Appendix D

Judgment

This cause having been heard October 22, 1963 on its merits, as well as on plaintiffs' motion for partial summary judgment and on the Pinney intervenors' motion to dismiss for failure to state a cause of action; and

The Court having filed opinions February 10, 1964 and findings of fact and conclusions of law herewith; and

The cause having been further heard March 16, 1964 on the form of judgment to be entered; it is

Ordered, Adjudged And Decreed:

(1) That the present districting of the Connecticut Senate so debases the voting rights of plaintiffs as to result in an invidious discrimination against plaintiffs who thereby are denied the equal protection of the laws in contravention of the Fourteenth Amendment of the United States Constitution.

(2) That the present apportionment of the Connecticut House of Representatives so debases the voting rights of plaintiffs as to result in an invidious discrimination against plaintiffs who thereby are denied the equal protection of the laws in contravention of the Fourteenth Amendment of the United States Constitution.

(3) That so much of Article Third, Section 5, of the Connecticut Constitution as imposes limitations upon equality of population between districts of the Connecticut Senate, being in contravention of the equal protection clause of the Fourteenth Amendment of the United States Constitution, is void and of no effect.

(4) That Article Third, Section 3, of the Connecticut Constitution, which precludes substantially equal weighting of the votes of all voters in the choice of members of the Connecticut House of Representatives, being in contravention of the equal protection clause of the Fourteenth Amendment of the United States Constitution, is void and of no effect.

(5) That defendants JOHN DEMPSEY, ELLA T. GRASSO, DONALD J. IRWIN and RAYMOND S. THATCHER, their privies and their successors in office, are enjoined from doing any act or taking any steps in furtherance of nominating or holding elections of senators or representatives to the Senate or House of Representatives of the State of Connecticut, and said defendants are further enjoined from certifying or in any other manner declaring that the results of any such nominations or elections are valid or that the legislature of the State of Connecticut is properly or legally constituted, unless *either*

(a) all senators and representatives are nominated and elected to the Senate and House of Representatives of the State of Connecticut from the state at large, *or*

(b) all senators and representatives are nominated and elected to the Senate and House of Representatives of the State of Connecticut pursuant to a redistricting of the Senate and a reapportionment of the House to be effected promptly by the General Assembly so that the voting rights of plaintiffs in the choice of members of both houses as guaranteed by the equal protection clause of the Fourteenth Amendment of the United States Constitution will not be impaired; such redistricting of the Senate and reapportionment of the House by the General Assembly to be done in such manner as to achieve substantially equal weighting of the votes of all voters in the choice of members of both houses and in accordance with the guidelines indicated in the opinion of the late Judge Charles E. Clark included as an appendix to the opinion of this Court, filed February 10, 1964.

(6) That execution of the injunction in the foregoing paragraph (5) of this Judgment is stayed until the receipt by this Court of the mandate of the Supreme Court of the United States upon any appeal or appeals taken to the Supreme Court from this Judgment, *provided*, in view of the vital interest of the people of the State of Connecticut in bringing promptly into being a legislature which does not contravene the United States Constitution, that such appeal or appeals to the Supreme Court be prosecuted diligently and expeditiously, including adherence to the following schedule:

(a) notice of appeal (Supreme Court Rule 10) shall be served and filed within five (5) days from the date of this Judgment;

(b) cross-designation or stipulation as to portions of record to be included in transcript (Supreme Court Rule 12) shall be served and filed within five (5) days after notice of appeal is filed;

(c) transcript of record as designated or stipulated shall be prepared by the Clerk of this Court for transmission to the Supreme Court (Supreme Court Rule 12) within the time specified in subparagraph (d) *infra;*

(d) case shall be docketed and record shall be filed with the Clerk of the Supreme Court (Supreme Court Rule 13) within twenty (20) days from the date of this Judgment;

(e) jurisdictional statement (Supreme Court Rule 15) shall be served and filed simultaneously with the docketing of the case and filing of the record and within the time specified in subparagraph (d) *supra;*

(f) also simultaneously with the docketing of the case and filing of the record and within the time specified in subparagraph (d) *supra*, appellants shall file an appropriate motion with the Clerk of the Supreme Court to advance this case, requesting for good cause that it be set down for argument on the earliest date convenient to the Supreme Court, having regard to the similarity of issues in the instant case and cases now pending in the Supreme Court (Supreme Court Rule 43(3) and (4)).

All parties and their counsel are ordered at every stage of the appeal or appeals from this Judgment and in all respects to expedite proceedings, including strict adherence to the foregoing schedule. The Clerk of this

Court is directed to give top priority to preparation of the transcript of record for transmission to the Supreme Court.

(7) That jurisdiction of this action is retained for the entry of such further orders by this Court as may be necessary and proper, including any order required in the absence of prompt action by the General Assembly contemplated by paragraph (5)(b) of this Judgment, and as more fully described in the Court's opinion of February 10, 1964.

(8) That plaintiffs' motion for partial summary judgment is denied as moot.

(9) That the Pinney intervenors' motion to dismiss for failure to state a cause of action is denied.

(10) That no costs shall be taxed against any party to this action.

Dated at New Haven, Connecticut, this 26th day of March, 1964.

J. JOSEPH SMITH
United States Circuit Judge

WILLIAM H. TIMBERS
United States District Judge

ROBERT P. ANDERSON
United States District Judge

(Concurring in part and dissenting in part in accordance with my dissenting opinions of February 10, 1964 and March 26, 1964).

Appendix E

List of Towns Which Have Formally Authorized Joinder in Motion to Intervene and Years of Incorporation.

Town	*Year Incorporated*
Deep River	1635*
Farmington	1645
Woodstock	1686**
Preston	1687
Colchester	1698
Lebanon	1700
Canterbury	1703
New Milford	1712
Ashford	1714
Litchfield	1719
Willington	1727
Union	1734
Sharon	1739
Canaan	1739
Kent	1739
Goshen	1739
Cornwall	1740
Salisbury	1741
Hartland	1761
Colebrook	1779
Washington	1779
Hampton	1786
Montville	1786
Warren	1786

* settled; united with Connecticut 1644

** settled; annexed to Connecticut 1749

Town	*Year Incorporated*
Lisbon	1786
Bethlehem	1787
Sterling	1794
Roxbury	1796
Franklin	1796
Oxford	1798
Columbia	1804
Canton	1806
Burlington	1806
North Stonington	1807
Griswold	1815
Salem	1818
Madison	1826
Prospect	1827
Avon	1830
Bethany	1832
Clinton	1838
East Lyme	1839
Eastford	1847
Essex	1852
Old Lyme	1855
Bridgewater	1856
Scotland	1857
North Canaan	1858
East Granby	1858

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In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1032

TOWN OF FRANKLIN, ANTHONY CARBONI, TOWN OF SALEM AND ELMER P. CHAPPELL (together with all other duly constituted towns of the State of Connecticut for which permission to intervene was requested, and their respective First Selectman),

Appellants

vs.

OLIVER BUTTERWORTH, MIRIAM BUTTERWORTH, S. RAINS WALLACE, ROBERT BEACH, CHARLES JACOBSON, DAVID S. MACLAY, BRADLEY MOREHOUSE, JOHN NORMAN, GEORGE LUCAS AND ALBERT E. HOLLAND,

Appellees

On Appeal from the United States District Court for the District of Connecticut

MOTION TO AFFIRM

Of Counsel:
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TOWN OF FRANKLIN, ET AL.,
Appellants

vs.

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Appellees

On Appeal from the United States District Court
for the District of Connecticut

MOTION TO AFFIRM

Appellees in the above-entitled case move to affirm on the ground that the question presented is so unsubstantial as not to require further argument.

STATEMENT

The complaint in this case was filed by the ten plaintiffs on December 27, 1962. The case was heard by a three-judge Court on October 22, 1963. On February 10, 1964, the Court filed memoranda of decision holding that both houses of the Connecticut General Assembly were districted or apportioned in such a manner as to deny the plaintiffs the equal protection of the laws under the Fourteenth Amendment. In the memorandum of the Court, counsel were instructed to submit proposed forms of decree by March 2, 1964, with a hearing upon such proposed forms of decree scheduled for March 16, 1964.

At all times after the filing of the complaint, the case was widely reported in the Connecticut press, and the issues involved were fully set forth.

At the hearing on October 22, 1963, the Attorney General of Connecticut made plain to the Court that he would not defend the constitutionality of the Connecticut system of districting and apportionment in either house of the General Assembly.

On March 9, 1964, four weeks after the decision of the Court, and one week before the hearing on the form of decree, the appellants filed a motion to intervene. The pleading upon which their motion was based was a motion to postpone the hearing until counsel for the proposed intervenors had had additional time "to give adequate consideration to the several questions presented by this action." A brief was filed on behalf of the proposed intervenors on March 13, 1964, and was first seen by counsel for the appellees on the morning of the hearing, March 16, 1964.

At the hearing, the appellees raised no objection to the suggestion that the proposed intervenors be allowed to file a brief *amicus*. This procedure was permitted by the lower Court.

The appellees have no objection to permitting the proposed intervenors to file a brief *amicus* in this Court and, if the Court deems it helpful, to be heard in oral argument.

In the appellants' Statement of the Case, the plaintiffs are described as "ten individuals from six different urban towns." The appellees profess ignorance as to what constitutes an "urban town". The appellees are residents of six different towns in Connecticut and alleged in the complaint that the system of apportionment in Connecticut diluted their votes for representatives in the Connecticut House and Senate.

Aside from the matters set forth above, the appellees accept the appellants' Statement of the Case.

THE QUESTION PRESENTED IS FRIVOLOUS

The District Court decided in this case that the Connecticut towns were in effect election districts for the purpose of this suit and that therefore they had no right to intervene as necessary parties. Since the motion was untimely, it was denied. Even Judge Anderson, who dissented, would only have allowed individual electors, or a representative sampling of them, to intervene: he was clearly troubled by the problem of the standing of the towns, *qua* towns, to intervene as parties. The majority of the Court found that the small-town voters were ably and articulately represented by the Pinney intervenors (who had made timely motions to intervene at an early stage in the proceedings) and had in fact been bearing the burden of the defense in the suit, in so far as representation in the House was concerned.

Appellants cite a number of cases for the proposition that Connecticut towns have the right to sue and be sued, as well as other similar rights under Connecticut law, but these cases are, of course, aside from the point: the question is not whether the towns may sue to vindicate a right which they admittedly possess, but whether they possess any right in the first instance.

In other words, the sole question is whether, for purposes of this suit, the towns rather than the citizens are the entity represented in the Connecticut House or whether the towns simply constitute election districts. Upon this point, the appellants cite neither case nor history, and indeed appellees know of none. Appellants' only authority for the proposition that towns in Connecticut are for these purposes something more than election districts is a phrase in the Connecticut Constitution to the effect that every town shall be entitled to send one or more representatives to the House. Of course, this phrase can equally easily be construed as a short-hand method of describing the election districts.

Article I, Section 2 of the Connecticut Constitution states plainly: "That all political power is inherent in the people, and all free governments are founded on their authority and instituted for their benefit . . ." That the citizens of towns, and not towns *qua* towns, are represented in the House is bolstered by the language of Article Third, Sections 7 and 8, where it clearly appears that the electors in the town are the group which choose the representatives and not the town itself.

If, as the appellants allege, the Connecticut towns are indispensable parties, in the sense that the towns, rather than the voters in them, may be bound by the judgment in this case, it would appear to follow that, with respect to the Connecticut House, individual voters, such as the appellees, have no right or standing to bring an action to vindicate their rights as voters under the Constitution and laws of the United States. For such rights, under the appellants' theory, reside in the town and not in the individual voter. This conclusion flies in the face of a long line of decisions of this Court, where individual voters have been held to have standing. The most recent of such cases is, of course, *Baker* vs. *Carr*, 369 U.S. 186 (1962).

Moreover, municipal corporations have regularly been denied standing in the federal courts to attack state legislation as

violative of the Federal Constitution. See, *e.g.*, *Pawhuska* vs. *Pawhuska Oil & Gas Co.*, 250 U.S. 394 (1919); *Trenton* vs. *New Jersey*, 262 U.S. 182 (1923); *Williams* vs. *Mayor of Baltimore*, 289 U.S. 36 (1933). And, the right claimed by the proposed intervenors, if it is not an exclusive right of the towns, must be one representative of the rights of voters. In that posture, the rule of *Massachusetts* vs. *Mellon*, that it is no part of a state's duty or power to enforce the rights of its citizens in respect to their relations with the federal government, precludes intervention of the towns in this suit. 262 U.S. 447, 485, 486 (1923).

In short, the claim that the right to send representatives to the Connecticut lower House is lodged in the towns themselves, rather than in the voters of the towns, while ingenious, can find no support in Connecticut practice or Connecticut law. It flies in the face of certain well established federal jurisdictional principles relating to standing. And it would, in the last analysis, effectively negate this Court's holding in *Baker* vs. *Carr*.

For these reasons, the appellees believe that the claim is frivolous. They therefore move this Court to affirm the decision of the District Court.

Respectfully submitted,

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Appendix A

Constitution of the State of Connecticut, Article First, Section Two

That all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and that they have at all times an undeniable and indefeasible right to alter their form of government in such manner as they may think expedient.

Constitution of the State of Connecticut, Article Third, Sections Seven and Eight

Sec. 7. A general election for members of the general assembly shall be held on Tuesday after the first Monday of November, biennially, in the even-numbered years. The general assembly shall have power to enact laws regulating and prescribing the order and manner of voting of said members, and also providing for the election of representatives at some time subsequent to the Tuesday after the first Monday of November in all cases when it shall so happen that the electors in any town shall fail on that day to elect the representative or representatives to which such town shall be by law entitled.

Sec. 8. At all elections for members of the general assembly the presiding officers in the several towns shall receive the votes of the electors, and count and declare them in open meeting. The presiding officers shall also make duplicate lists of the persons voted for, and of the number of votes for each, which shall be certified by the presiding officers; one of which lists shall be delivered to the town clerk, and the other within ten days after said meeting, shall be delivered under seal, either to the secretary, or to the sheriff of the county in which said town is situated; which list shall be directed to the secretary, with a

superscription expressing the purport of the contents thereof. And each sheriff who shall receive such votes, shall, within fifteen days after said meeting, deliver, or cause them to be delivered to the secretary.

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Appellees

On Appeal from the United States District Court for the District of Connecticut

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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Appellees

On Appeal from the United States District Court for the District of Connecticut

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

As permitted by Rule 16 of this Court, appellants submit the following comments in opposition to appellees' motion to affirm:

1. The statement in appellants' Jurisdictional Statement identifying plaintiffs as "ten individuals from six different urban towns" referred to on page 3 of the motion to affirm is a paraphrase of Judge Clark's description of the plaintiffs (in his opinion printed as an Appendix to the decision of the Court below) as "ten voters from six different urban towns of the State, suing for themselves and others similarly situated . . ." See Appendix to Jurisdictional Statement in *Pinney* vs. *Butterworth*, No. 1078, page 24.

2. At page 4 of the motion to affirm appellees state that "the appellants cite neither case nor history, and indeed appellees know of none" on the question whether towns "are the entity represented in the Connecticut House or whether the towns simply constitute election districts." It is submitted that the clear import of the cases and constitutional provisions cited in the Jurisdictional Statement is that towns are not merely election districts and no support can be found for appellees' claim to the contrary. Moreover, there is incontrovertible historical support for the status of appellant towns not only as more than merely election districts but also as real parties in interest with respect to representation in the Connecticut House. As summarized in the Jurisdictional Statement in *Pinney* vs. *Butterworth* (p 7), "Representation of towns as towns in the Connecticut General Assembly dates back to the beginnings of Connecticut history . . ." and it is also pointed out that:

> "If the Judgment of the District Court is upheld by this Court, many towns of Connecticut will, for the first time in their history, be deprived of a resident representative in the General Assembly. The rationale of the Connecticut House of Representatives, which is the representation of towns as towns, regardless of their populations, would thus be abrogated."

In short, appellees can not sustain the proposition that appellant towns are merely election districts and since such proposition is the sole basis for their motion it should be denied.

3. Appellees' contention that the sustaining of appellants' position would mean appellees have no standing and be inconsistent with holdings in "a long line of decisions of this Court" including *Baker* vs. *Carr* is challenged. Appellants do not contend that appellees do not have standing and a holding that appellants have such interest in this case that they are necessary

parties would not be inconsistent with appellees having standing. Appellants' right to be made parties and the standing of appellees are not mutually exclusive. No decision by this Court is inconsistent with appellants' claim and appellants' right to be heard finds support in the many decisions previously cited.

4. Cases cited by appellees holding that municipal corporations have no standing in federal courts to attack state legislation as violative of the Federal Constitution are irrelevant to the issue in the present case. The situation here is entirely different since appellees, not appellants, have invoked the Fourteenth Amendment and the jurisdiction of the federal courts seeking relief which will deprive appellants of rights secured by the Connecticut Constitution. Appellants are not claiming the protection of the Federal Constitution against the State of Connecticut, but rather are invoking the protection of the Due Process Clause of the Fifth Amendment and of provisions of the Federal Rules of Civil Procedure to obtain a right to assert their claims based upon the Connecticut Constitution.

5. Appellees rely on Article I, Section 2 of the Connecticut Constitution as supporting their contention that towns are merely election districts. If such affirmation that political power is inherent in the people does support appellees' argument then the fact that the Federal Constitution clearly is also based on the power of "we the people" [See *McCulloch* vs. *Maryland*, 4 Wheat. 316, 403 (1819), wherein Chief Justice Marshall stated that "the government proceeds directly from the people."] must mean that the States are merely election districts in the federal system with no legal interest in the organization of the United States Senate. As a matter of fact it should be noted that the provisions with respect to the interests of Connecticut towns in their representatives under the Connecticut Constitution is far more explicit than the provision with respect to the interests of the States in the Senate of the

United States. Compare Article III, Section 3 of the Constitution of Connecticut with the Seventeenth Amendment of the Constitution of the United States.

6. Appellees' indication that they would interpose no objection to permitting appellants to file a brief *amicus* in this Court, while appreciated, is not a solution to the issues presented. Permission to file an *amicus* brief is not a legal substitute for the right to participate as a party and it cannot correct the jurisdictional defect of absence of indispensable parties. A court no more can accurately determine what the effect of presence in litigation of additional parties would have been than it can prognosticate the effect of absence of counsel on the trial of a criminal accused. However, it is to be noted that to some extent the Court below relied in reaching its decision on the absence of evidence on certain matters and it judicially noticed certain other matters. Appellants as parties may well have eliminated such void or presented evidence contradicting the conclusions judicially noted. See Findings of Fact, Appendix to Jurisdictional Statement in number 1078, page 91.

7. Appellees' motion does not deal at all with the fact that the motion to intervene here involved claims a right to intervene by individual First Selectmen as representatives of their towns as well as by the towns themselves.

For the reasons set forth in the Jurisdictional Statement and for the foregoing reasons, the appellants submit that the motion to affirm should be denied.

Respectfully submitted,

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